

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

ARNOLD et al.,)	
)	
-----Plaintiffs,)	
)	Case No.
vs.)	23-CV-528-JLH-CJB
)	
X Corp., et al.,)	
)	
-----Defendants.)	

TRANSCRIPT OF MOTION TO QUASH

MOTION TO QUASH had before the Honorable Christopher J. Burke, U.S.M.J., on the 16th of October, 2023.

APPEARANCES

CHRISTENSEN LAW LLC
BY: JOSEPH CHRISTENSEN, ESQ.

-and-

KAMERMAN UNCYK SONIKER & KLEIN
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Counsel for Plaintiff

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1 THE COURT: Let me say a few things for the
2 record, and the first is that we're here today in the matter
3 of *Arnold versus X Corp., et al.* It's Civil Action Number
4 23-528-CFC-CJB here in our court, and we're here for
5 argument on Defendants' motion to quash certain subpoenas
6 that were served by Plaintiffs. The Court has already
7 addressed another issue, which was Defendants' request for a
8 stay, and an oral order issued today, but we'll hear
9 argument today on the motion to quash issues.

10 Before we go further, let me have counsel on the
11 line for each side identify themselves for the record.
12 We'll start first with counsel on the plaintiffs' side.
13 We'll begin there with Delaware counsel, and I'll also ask
14 Delaware counsel to let me know which of the counsel on its
15 side will be addressing the motion.

16 MR. CHRISTENSEN: Good morning, Your Honor. Joe
17 Christensen from Christensen & Dougherty on behalf of the
18 plaintiffs. I'm joined by my co-counsel at Kamerman, Uncyk,
19 Soniker & Klein, Akiva Cohen, who will be making the
20 argument this morning, Your Honor.

21 THE COURT: Okay. Thank you and welcome.

22 And we'll do the same for counsel on Defendants'
23 side. Again, we'll begin with Delaware counsel, and I'll
24 ask counsel to let me know who will be arguing for your
25 side.

1 MR. BARILLARE: Good morning, Your Honor. Jody
2 Barillare from Morgan Lewis on behalf of the defendants.
3 With me today are my colleagues Eric Meckley and Brian
4 Loughnane, and with Your Honor's permission, Mr. Meckley
5 will be delivering the argument for the defendants.

6 THE COURT: Great all right. So then I should
7 turn to Mr. Meckley first, as it's Defendants' motion.

8 And, Mr. Meckley, I guess I just -- let me jump
9 in with a couple of questions in that regard and then I'm,
10 certainly, of course, happy to let you address anything you
11 think we didn't cover in those questions as well.

12 And I guess the first question that I have kind
13 of relates a bit to timing issues. Obviously, our court is
14 busy. We have to try to do things in an efficient manner as
15 it relates to all that's before us, and one of the -- it
16 seems like a key issue that's at play with regard to the
17 applicability of the crime fraud exception is that the Court
18 would have to figure out whether a sufficient prima facie
19 case has been laid out that the defendants intended to
20 engage in fraud via their acts relating to the severance
21 provision and that they likely would have communicated about
22 that.

23 And it seems to me that that issue and the
24 decisions the Court has to make kind of line up pretty
25 squarely with at least one of the questions that would Court

1 would have to resolve on the pending motion to dismiss for
2 lack of failure to state a claim and that is, did Plaintiffs
3 plausibly allege a fraud claim? Do you think that's right,
4 that a lot of the analysis or the type of analysis you'd be
5 looking at as to the one issue would be pretty similar --
6 not exactly the same but pretty similar -- to the analysis
7 you'd be looking at as to the other?

8 MR. MECKLEY: Your Honor, I don't think it's the
9 same, and the reason I don't think it's the same is because
10 the standards for the Rule 12(b)(6) motion under Twombly
11 and Iqbal are going to be have you pled factual allegations
12 that would plausibly state the claim whereas with respect to
13 the burden of proving the crime fraud exception would apply
14 that would entitle you to this discovery is a higher
15 standard. And I think it, necessarily, has to be a higher
16 standard for a variety of reasons, the first of which is the
17 attorney-client privilege and work product doctrine is
18 something that is pretty significant in the law, and there's
19 a lot of very good reasons why it exists. And if the mere
20 pleading of allegations in the complaint were sufficient
21 enough to entitle you to discovery that invaded and intruded
22 upon the attorney-client privilege, you're basically putting
23 the cart before the horse, letting the tail wag the dog. It
24 is not the same standard.

25 One is have you stated a potential claim. The

1 other relates to, presumably, evidence that you would seek
2 to try to prove the merits of that claim, which is a
3 different standard.

4 THE COURT: So I think your response is, well,
5 the standards will differ. The 12(b)(6) standard is, has a
6 plausible claim been asserted, and Plaintiff would be
7 suggesting they have made certain allegations about why they
8 think that fraud had occurred and those need to only be
9 plausible, whereas we know that in the crime fraud exception
10 world, what I'd be assessing is, is there a prima facie case
11 that has been made and what is that burden.

12 Well, on the one hand it's said to not be a
13 particularly heavy one and doesn't require preponderance of
14 the evidence. But on the other hand, it's not nothing, and
15 it requires some evidence, whatever that means. We'll get
16 to that.

17 So I mean, both worlds are, you know, standards
18 that are less than a preponderance of the evidence.
19 Plaintiff relying, probably in both cases, on similar type
20 of facts, a lot of which seemed like it had to do with
21 what's in the merger agreement or maybe some additional
22 communications. I get that the standards aren't exact,
23 they're different, and, of course, you have to be mindful of
24 the difference, and you have to rule based on differences.

25 But in both cases, it's a Court assessment of

1 has enough been pled, pointed to with regard to this fraud
2 issue. And I guess if the Court would be making very
3 similar types of analyses and decisions, I guess I'm not
4 sure why it is that I'd be rushing to make that decision in
5 the prima facie case context now as it relates to the
6 subpoenas as opposed to when I get to the motion dismiss,
7 I'm going to assess that fraud issue anyway in the context
8 of plausibility. Once I assess it, I'll have had the chance
9 to look through the arguments in great detail on a motion to
10 dismiss, and if I turn to this prima facie case issue, the
11 analysis should be straightforward from there, albeit under
12 a different standard.

13 I'm wondering why I wouldn't take it in that
14 order as a way to be efficient as a Court knowing all that
15 we have before us in this district.

16 MR. MECKLEY: And, Your Honor, I appreciate
17 that.

18 And the reason I would suggest that we not go
19 that route is because, one, as I've already mentioned, the
20 standards are different, and, two, with the complaint, it's
21 allegations. With respect to the crime fraud exception, the
22 plaintiff's burden there, certainly not a preponderance of
23 the evidence, but evidence, more than allegations. And the
24 fact that Your Honor's earlier ruling today denying the
25 request for the stay of discovery, also, I think, plays into

1 this because now, presumably, Plaintiffs will have the
2 ability to conduct discovery to try to get evidence that
3 doesn't involve communications with attorneys which are
4 privileged and have the opportunity to take depositions,
5 serve requests for production, interrogatories, et cetera
6 that presumably if there is any such evidence that might,
7 then, support trying to breach the attorney-client
8 privilege, then you'd have some evidence and it might not
9 even be necessary.

10 So I think they're completely different
11 standards, and your ruling on the motion to dismiss simply
12 says whether a plausible claim has been stated. It wouldn't
13 necessarily translate to a finding that a prima facie case
14 of the crime fraud exception has been met, and I think there
15 should be an opportunity to --

16 THE COURT: Can I just jump in those because I
17 understood you to fault Plaintiffs' showing as to the prima
18 facie case standard to be something like one of the reasons
19 why we think that their showing is insufficient is that they
20 have, essentially, only relied on the types of arguments
21 they are making as to the allegations in their complaint.
22 They have pointed to certain aspects of certain contracts
23 and certain statements that are made, just as they're doing
24 in their complaint. In the allegations they make there,
25 they haven't mustered any additional evidence, documents,

1 affidavits bolstering facts that demonstrate that a fraud
2 was afoot. Essentially, the evidence is similar across both
3 and is wanting as to both. I thought that was the gist of
4 your argument. Am I wrong?

5 MR. MECKLEY: No, you're correct that the
6 evidence is wanting in both but with respect to different
7 items. So the evidence in the complaint would be
8 allegations, substantive factual allegations. The evidence
9 with respect to the crime fraud exception would be evidence,
10 actual documents, testimony, interrogatory responses, et
11 cetera.

12 THE COURT: I'm sorry to jump in. I understand
13 your argument, but let me ask it this way: I don't think
14 from your view when it comes to the allegations that the
15 plaintiffs have made in their complaint about the asserted
16 fraud, we look at that, and then we look at the allegations
17 the plaintiff has made in response to this issue, the crime
18 fraud exception issue, I understand your position to be
19 there's no real difference between the things that the
20 plaintiffs are pointing to as to either of those contexts,
21 and that's the problem. We, the defendants, believe that
22 there needs to be evidence cited in the crime fraud context,
23 and they don't have any extra evidence.

24 Essentially, Judge, what they're doing is the
25 same arguments they're making in the complaint about

1 plausibility, the same things they're pointing to, the same
2 document, the same words, that's the same stuff they're
3 relying on here and they need more. I thought your point
4 was that their evidence is the same as to both motions,
5 essentially, and it's not good enough in the crime fraud
6 context; isn't that right?

7 MR. MECKLEY: Yes, that is correct, and it's
8 allegations in one case and mere allegations in the other.
9 And I would just -- I already said it. Allegations aren't
10 sufficient in the crime fraud exception to overcome the
11 attorney-client privilege.

12 THE COURT: And I'm trying to understand how it
13 would prejudice you were I to decide that I think what I
14 should do is I should first take up the motions to dismiss
15 as they relate to the fraud claim and other aspects of it
16 and then after that deciding that, then pivot back to this
17 subpoena issue and use the knowledge and analysis that I
18 gained through that motion to dismiss resolution process to
19 hopefully pretty quickly dispose of this issue then.

20 I'm not sure I see how that path would prejudice
21 you. In fact, I would think in some ways it would be the
22 plaintiff who would be telling me not to do that because it
23 may take some time to get to the motions to dismiss. And in
24 the interval, your folks who are being subpoenaed wouldn't
25 have to give up any documents or information. I'm a little

1 confused as to why it is you wouldn't preference that kind
2 of process. I understand why the plaintiff may not like it,
3 but I thought it would be a process you would say is
4 positive, but seems like you're not, and I'm trying to
5 figure out why.

6 MR. MECKLEY: I don't want to misstate my
7 position on it. I think, certainly, a sequencing process
8 like you've described is absolutely appropriate, and I don't
9 believe it's -- I mean, my position all along has been the
10 subpoenas are entirely premature, but I think the process
11 you've outlined, where the Court decides the motion to
12 dismiss with respect to the fraud claim first and then we
13 could revisit this issue, my position, Your Honor, is that
14 when revisiting the issue at the appropriate time -- and,
15 obviously, it depends on what your ruling says, of course,
16 but that it isn't a foregone conclusion at that point that
17 if you find there is sufficient allegations within the
18 complaint to overcome the motion to dismiss, our position is
19 just that is not a default to, well, now the crime fraud
20 exception has been proven and, therefore, let's proceed with
21 these subpoenas. That's my position.

22 THE COURT: Understood. And I understand that
23 part of it, and to that part, I think what it seems like
24 from reading the briefs is there's a dispute here. We know
25 that under the standard, the plaintiffs have to put forward

1 or make a presentation of "evidence" which, if believed by
2 the fact finder, would be sufficient to support a finding
3 that the elements of the crime fraud exception are met. And
4 it seems like in the briefs the parties are having a fight
5 about what is that can be sufficient to constitute that
6 requires "evidence."

7 And I think you're suggesting in your briefing
8 that something more than the types of facts or the types of
9 provisions of contractual agreements that the plaintiffs
10 are relying on here, something more than the additional
11 announcements that they're relying on, is needed. They
12 don't have enough evidence. They have merely allegations or
13 something less. And I think the plaintiff is saying no, the
14 things we've pointed to are sufficient to be the kind of
15 evidence that you need to demonstrate the applicability of
16 the crime fraud exception.

17 And I guess my question is, I'm not sure the
18 parties have provided me with -- when I see those arguments
19 being made, I think to myself there must be cases out there
20 that say something about what exactly is the quantum of
21 evidence needed. Does a party need to rely on declarations
22 or affidavits or, you know, some other type of similar type
23 of evidence to meet that evidence burden? Or do parties win
24 these kinds of cases and show that the crime fraud exception
25 applies by pointing to contractual language or by largely

1 mirroring allegations in the complaint or whatever? There's
2 cases that would tell me what's enough and what's not
3 enough, what constitutes evidence and what doesn't. I'm not
4 sure I have that stuff in the briefing. I know you were
5 somewhat limited by the page limit, but are there cases that
6 get into that? Are you aware of cases that support your
7 argument here that the evidence the plaintiff cites isn't
8 enough evidence?

9 MR. MECKLEY: Your Honor, two points on that.

10 The first is right now I am not specifically
11 aware of cases that identify the quantum of evidence that
12 would be necessary on that point.

13 But number two, back to your direction regarding
14 sequencing, I think following the Court's resolution of the
15 motion to dismiss, at that point with this particular focus
16 that you have identified, I would suggest the parties would
17 be able to come back with more briefing, perhaps beyond this
18 district, looking at that exact issue, which is what the
19 quantum of evidence and we could actually provide the Court
20 with something more fulsome to make a ruling on.

21 THE COURT: Okay. The other thing I wanted to
22 just ask about is I'm trying to get a handle on -- and I
23 couldn't get it from the briefing -- what types of and how
24 many documents there are here that might be implicated by
25 the subpoenas. I think one of the things that the

1 plaintiffs' side asked me is, Judge, if in doubt, do an
2 in-camera review of the documents at issue and make your own
3 determination about whether you think there's sufficient
4 evidence here.

5 But I don't even know -- what are we talking
6 about? How many documents are at issue? What would be the
7 scope of that kind of review if I had to do it? Have the
8 parties thought or talked about that, Mr. Meckley, and do
9 you have anything you can share with me in that regard?

10 MR. MECKLEY: Your Honor, I wish I could share
11 more specifics with you about that but, frankly, I am not
12 sure. I know there's five law firms involved. I know that
13 the categories in the subpoenas are extremely broad. They
14 seek all documents and communications, work product drafts,
15 comments, discussions regarding multiple topics. I can't
16 speak to these other firms. I know from my own law firm
17 that that could encompass a huge number of documents and
18 data issues. So unfortunately, I don't think that this
19 would be just a perfunctory, brief, focused review that you
20 could look at and, in camera, make a very easy ruling on
21 that.

22 THE COURT: Okay. And then I guess the other
23 question I have for you is in your opening brief, the kind
24 of main rejoinder you seem to put forward as to why it is
25 that, in looking at the types of, I'll say, evidence -- you

1 might disagree that it should be called evidence -- the type
2 of evidence that the plaintiffs have pointed to at issue
3 here, that -- i.e., the evidence relating to the
4 communications in the merger agreement that plaintiffs will
5 be provided with severance benefits that are no less
6 favorable than Twitter's prior severance policy or the
7 subsequent communication that's attached at Exhibit 1 page
8 24 to the plaintiffs' brief that seemed to underscore that
9 kind of language, and the reality that there was also a
10 third-party beneficiary provision in the agreement, which I
11 think I understand is now being utilized by the defendants
12 to help undercut the argument that the type of severance
13 benefits the plaintiffs are suggesting exists can be
14 claimed.

15 I think the main rejoinder to the fact that that
16 wasn't -- as to your argument that wasn't sufficient
17 evidence was that one of the statements included the caveat
18 that these were only forward-looking statements that are
19 being made. And the plaintiff came back and said that
20 doesn't apply to our allegations here. The types of claims
21 that are being made about severance benefits don't have
22 anything to do with forward-looking statements talking about
23 potential uncertainties in the future. That's a totally
24 different thing.

25 Did you have any response to that line of

1 argument?

2 MR. MECKLEY: Sure, Your Honor. It goes to the
3 whole caveat about the statements in the FAQs. One, the
4 communication concerning forward-looking statements about
5 risk and certainties is a caveat that this should not be
6 taken as something concrete and certainly not a contractual
7 type of statement that is being made. And that is also,
8 then, married with the language that specifically talks to
9 the severance, which is, well, generally speaking and
10 generally the current severance policy seemed to be this.

11 But it doesn't change the analysis that if
12 severance was discretionary before and the representation is
13 that you'll get the same things you got before -- again, I'm
14 putting aside the third-party beneficiary piece here, which
15 is a significance piece -- if it was discretionary before,
16 it's discretionary now. And the FAQs cannot be read in a
17 vacuum exclusive of the merger agreement. They refer to the
18 merger agreement 20-plus times, so they are things that have
19 to coexist and, certainly, the FAQs don't trump or overtake
20 what the merger agreement says.

21 So I hope I've answered your question about the
22 caveat nature of these FAQs.

23 THE COURT: I guess what I was getting at is in
24 securities cases where I'm looking at forward-looking
25 statements, I specifically think of things like, look, we're

1 about to make some projections about we think what our
2 financial might be in the future based on data we have now.
3 These are forward-looking statements that can be affected by
4 events that occur hereafter. I think Plaintiffs' point was
5 when you're making comments about what your current
6 severance policy is and how it relates to a prior severance
7 policy, that's not the thing you're usually talk about when
8 you rely on "forward-looking statement" language. That's a
9 statement about present fact and how it relates to a past
10 fact. Is that wrong?

11 MR. MECKLEY: I'm not going to opine on whether
12 this specific language was intended to only apply to
13 statements related to the securities-type context. I will
14 say, and obviously witnesses can testify to this, I'm not
15 testifying to it, but that it's in the spirit and intent to
16 suggest that these FAQs are merely that. They are
17 statements that are frequently asked questions. They are
18 not amending, changing whatever the merger agreement says.
19 The merger agreement says what it says, and these FAQs are
20 something that might be considered, you know -- I don't want
21 to say supplementary to it because that's not actually
22 correct, but they are just maybe informative. So I think
23 it's in the spirit of the document, which is you should not
24 rely on anything in here.

25 THE COURT: Okay. And, Mr. Meckley, is there

1 anything further you wanted to add with regard to arguments
2 about these issues before I turn to your colleague on the
3 other side?

4 MR. MECKLEY: I did not, Your Honor. I did --
5 and I appreciate your ruling and I didn't know -- there was
6 one part of that that I did want to -- if you wanted me to
7 make a statement about it that I did want to draw your
8 attention to, but that's only if you wanted to entertain it.
9 This is on the same motion.

10 THE COURT: Sure. Is it a clarifying point,
11 something you're confused about or a clarifying point you
12 need to make?

13 MR. MECKLEY: Well, I think the ruling was
14 clear. It was one of the sentences specifically in the
15 ruling that I thought -- I felt I wanted to clarify so at
16 least the Court understood our position.

17 THE COURT: Sure. If you want to say something
18 for the record that you think just clarifies your position
19 for anyone who's looking at this in the future, go ahead.

20 MR. MECKLEY: Sure. And this is the sentence in
21 your ruling where you're referring to the unaffected claims,
22 and it states, "The unaffected claims will require
23 substantial discovery regarding the layoffs at the heart of
24 this case, and it appears to the Court that any unique
25 discovery that may be obviated were the motions to dismiss

1 successful would pale in comparison to that needed as to the
2 resolution of the unaffected claims."

3 And my position on that is these unaffected
4 claims, even though they're characterized as seven of them
5 are essentially three. One is a Warren claim, one is a
6 Family Medical Leave Act claim, and the third is a "wage
7 theft" claim. And I'm in California. There is no wage
8 theft claim that exists here. So it's really only three
9 claims, and these claims are very distinct from the other
10 claims which I would say are really the primary claims and
11 drivers in this case, so the discovery regarding those three
12 claims that I've identified, Warren, FMLA, and wage theft,
13 will, in fact, pale -- the discovery regarding those claims
14 will pale in comparison to the discovery regarding all of
15 these other seven claims that are the subject of our motion
16 to dismiss which are the primary focus of Plaintiffs'
17 lawsuit, not FMLA, not Warren. Those are very
18 straightforward things.

19 Just as an example with the Warren act, did you
20 give people notice or not. That's discovery that can be
21 completed in three requests for production and two
22 interrogatories, unlike all this other discovery we're
23 talking about. That was the point. I thought that the
24 Court certainly suggested that that discovery would, you
25 know, dwarf this other, and it's really the reverse.

1 THE COURT: Okay. All right. Certainly, you
2 made your point in terms of your view on the record.
3 Obviously, the Court has decided the motion and is not going
4 to revisit it. I'd also suggest that in the future if you
5 have briefing in which one of the components of that is a
6 reply brief, if you think points being raised by the
7 plaintiffs are incorrect, you have a place to say it.

8 And, frankly, we wouldn't be having this call if
9 the motions to quash weren't a part of the issues raised, so
10 I certainly would suggest that if arguments are there to be
11 made, they need to be made crisply in the briefs as well.
12 I'm not sure that what you just said was made crisply in the
13 reply brief. Again, parties are limited in the briefing,
14 but Defendants had space to say what they needed to say.

15 And I'll also just say for the record it would
16 be an unusual case, maybe not never happens, but it would be
17 an unusual 14-count a complaint in which seven of those
18 counts not challenged in our court and yet the entire case
19 would be stayed. In my experience, it would be an unusual
20 circumstance that the defendants were seeking here.

21 But as I said, the motion has been decided so we
22 won't have further argument on it. Let me turn to Mr. Cohen
23 on the plaintiffs' side to get his response.

24 And, Mr. Cohen, maybe we could start with the
25 place I started with the Defendants -- with Defendants'

1 counsel, Mr. Meckley, which is at some point I've been
2 referred the motions to dismiss here. I'm going to have to
3 make an assessment about whether or not what has been
4 alleged in the complaint suffices to set out a fraud claim.
5 It seems to me that, again, the standards are different --
6 though, again, both standards are less than an assessment of
7 whether a preponderance of the evidence has been put
8 forward -- that it might well make sense from an efficiency
9 standpoint -- and the Court needs to think about that in
10 light of all we have on the plate -- to tackle the issues
11 around the same time after I've had a chance to assess the
12 motion to dismiss. And it almost seems like here, I'm being
13 asked to preview the decision there on a motion to dismiss,
14 albeit in a slightly different evidentiary framework. If I
15 said to you why wouldn't I take that path here, what would
16 you say in response?

17 MR. COHEN: Yes, Your Honor. So I certainly
18 understand the attractiveness of that path from the Court's
19 perspective, and I certainly don't want to ask you to do
20 work that is inefficient. There's a couple of reasons why I
21 don't think that's the appropriate path here.

22 The first thing is that while the analyses are,
23 certainly, closely linked, they aren't identical, and I'm
24 not talking about what you're looking at specifically. What
25 I'm talking about is it is entirely possible -- and

1 obviously I don't think you should. It's entirely possible
2 that you could say that, sorry, the fraud claim is not
3 sufficiently well pled. I'm dismissing with it with leave
4 to replead. And also that the crime fraud exception has
5 been met, and that's because crime fraud really focuses in
6 on two of the factors in a fraud claim, whereas when you're
7 looking at the adequacy of the complaint, you're looking at
8 all five of the factors for fraud, including did the folks
9 rely on it and was there an intent to -- all of those things
10 come into play in the analysis of a fraud pleading.

11 And while we believe that when you do that
12 analysis you're going to find that we pled it sufficiently,
13 you might come back so us and say, look, you know, I think
14 you need to allege more clearly this element, see if you can
15 replead. The crime fraud analysis is different and it's
16 different in part because, as we put into our opposition,
17 the crime fraud analysis also applies to attempted fraud.
18 If you attempted to fraud somebody but they didn't actually
19 rely on it and there were no damages, they can't plead a
20 fraud claim because there wasn't any damage. Damage is an
21 element of fraud. But the fact that you made the attempt
22 means those communications are not protected by privilege.

23 And so the assessment here is really narrowly
24 focused. It's is there evidence of what you told people and
25 is there evidence that that thing that you told people was

1 knowingly and intentionally false. And here, Your Honor --
2 and I think if you look at the briefing on the motion to
3 dismiss, that's not what their argument is. Their argument
4 isn't we didn't tell these employees that there were special
5 protections for their severance in their merger agreement.
6 And their argument isn't, yes, there actually were special
7 protections, what we told them was true. And the argument
8 isn't, okay, there aren't special protections but we meant
9 there to be, we're just realizing later that there weren't.

10 Their argument is we actually never intended to
11 provide any special protections, and, Your Honor, I'd like
12 to address the questions you asked Mr. Meckley first and
13 then I think relatively briefly take a look at what was
14 actually told to the employees, what was actually put in the
15 merger agreement, and then what Twitter and its codefendants
16 have put before this Court that establish that they never
17 meant -- on their representations to the Court, they never
18 meant what they told the employees to be true.

19 THE COURT: Just to jump in and go back to my
20 original question, which is I think it is the case that to
21 the extent that here we're going to look at certain
22 language, certain documents, certain statements that you are
23 going to point me to to say, look, I think we met our burden
24 as to the prima facie case burden, that those statements,
25 words, documents are the same kinds of statements, words,

1 documents that you are pointing to and putting forward with
2 regard to your claim as to fraud.

3 So assessing those, looking at them, figuring
4 out their meaning, what their import is, how a person might
5 have read them and responded to them, I would probably be
6 doing a similar type of analysis, albeit using somewhat
7 different standards, when I assess the motion to dismiss the
8 fraud claim on the one hand and when I assess the crime
9 fraud exception issue on another. Is that fair?

10 MR. COHEN: Yeah, that is absolutely fair, Your
11 Honor. And, you know, obviously, if your decision is that
12 you're not going look at that until then, that's your --
13 that's why you're the judge and we're the advocates.

14 But I think that the analysis here is both
15 sufficiently narrow and also sufficiently distinct from what
16 you will be doing when you're looking at those things on the
17 motion to dismiss that it's worth taking this issue now so
18 that we can start getting this case moving so that we can
19 get -- frankly, this is going to be a big dispute before the
20 Court, so it would be good to get it as resolved as we can,
21 from our standpoint, as early as we can.

22 THE COURT: I think part of what you were saying
23 earlier, Mr. Cohen, is, theoretically, there is a way that
24 you can grant the motion to dismiss about the fraud claim.
25 If it came down to a different element like a damages

1 element, that would mean you didn't pass on these, and I
2 think I get that point.

3 In terms of if I were going to do that -- again,
4 I'm not saying I will. I have to figure out what is most
5 efficient and figure out how it plays into the issues -- it
6 would seem like in terms of prejudice to you, you might be
7 pounding the table more if the case wasn't moving forward
8 otherwise as to discovery and yet you had these subpoenas
9 out there and you thought there was some basis to enforce
10 them. Fair to say that even it meant pausing a decision on
11 this issue until I get to the motion to dismiss and that
12 took some time that the prejudice to you probably is less as
13 compared to a place where a stay has been granted and this
14 case isn't moving forward at all? Is that fair?

15 MR. COHEN: Certainly, yes. I will say I'm not
16 dispositionally a pound-the-table type of person. I'm not
17 sure you'd see it in the same way.

18 That said, to the extent Your Honor is inclined
19 to do that and particularly -- this was going to be part of
20 my answer on your question about in-camera review. There
21 are a lot of steps here before we get to production of
22 documents. We need written responses back. We need,
23 essentially, a log of the documents because, assuredly, if
24 Your Honor hasn't ruled on this motion to quash everybody
25 responding is going to be issuing a privilege log. At that

1 point, we can assess, if Your Honor determined an in-camera
2 review was necessary that we hadn't met the standards, we
3 could assess, number one, how many documents are involved
4 and, number two, if necessary, come up with some sort of
5 sampling mechanism so that instead of it is a large
6 amount -- and I don't know that it is a large amount.

7 Mr. Meckley described these as broad requests.

8 Yes, they used the words "all documents" but
9 that's not a totem because the requests were actually really
10 narrowly focused. It was documents relating to the specific
11 provisions of the merger agreement at issue, sections 6.9(a)
12 and (e) of the merger agreement and 9.7 which is the other
13 third-party beneficiary clause that they were arguing sort
14 of makes this whole thing meaningless, and the
15 communications with the employees. So it was relatively
16 narrowly focused. It's not going to encompass every
17 document about communications about the merger agreement or
18 anything like that.

19 But to the extent that it is a large universe,
20 we'll have to pull together a sampling mechanism. What I
21 certainly would ask, Your Honor, is that to the extent that
22 you're saying, look, I'm going to put off deciding the
23 motion to quash until after I've had a chance to review the
24 motion to dismiss, what I wouldn't want is if it takes the
25 Court a month or two months or however long -- and I

1 understand Your Honor's schedule -- that only then at that
2 point do we start to spin off the mechanism of figuring out
3 what those documents are, privilege log, mechanism for
4 sampling because that process in and of itself could take a
5 couple of months. If the Court is going to pause ruling on
6 the motion to quash then the law firms responding to the
7 subpoenas should produce written responses and objections to
8 the request, run searches, identify how many documents might
9 be responsive, and start the process of automated logging to
10 the point where, you know, you have, okay, look, here's --
11 just based on what we see in our document review platform,
12 here are the two strums and the subjects of each of these so
13 that we can start to get a sense of which documents we might
14 be asking you to look at.

15 And frankly, Your Honor, the timing on this
16 merger agreement, it was negotiated in the space of, if I
17 understand correctly, three or four days. It's not a large
18 window, and the timing of the communications with the
19 employees, frankly, any communications between these folks
20 and their lawyers about what they could tell the employees
21 about these special protections would be something that we
22 would want, at the very at least, the Court to review in
23 camera unless it's an extremely large number.

24 THE COURT: Am I correct here, Mr. Cohen, that
25 the parties are proceeding under the assumption that any

1 documents or communications implicated by the subpoenas
2 will, in fact, be subject to a claim of attorney-client
3 privilege or attorney work product?

4 MR. COHEN: I think, Your Honor, that that's not
5 true for any of the e-mails that crossed paths. So if you
6 had people on opposite sides of negotiations e-mailing to
7 each other during negotiations, those are not going to be
8 privileged, but my assumption is that at least a significant
9 portion of the documents are going to be internal to the law
10 firms or client -- to firm representing it. So I don't
11 think all the documents will be privileged, so there should
12 be some production, regardless, but I think there's going to
13 be a larger percentage, obviously, than normal. When you're
14 issuing a subpoena to a law firm, that's going to be
15 privileged, which we wouldn't have done if we didn't have a
16 good-faith belief.

17 THE COURT: I know you want to make some points
18 about what is the substance of your argument with regard to
19 why you met the hurdle, but I guess my question there is --
20 or one question I have before that is what I asked
21 Mr. Meckley, which is it does seem like the defendant or the
22 defendant's side is saying we understand what the plaintiffs
23 have pointed to here, the content, the things that they have
24 pointed to, to demonstrate that they have met the prima
25 facie case burden, and we are asserting that that substance,

1 those documents and/or allegations about certain documents,
2 contractual language, et cetera, just can't serve to meet
3 the quantum of evidence that is required by the caselaw.

4 And I guess my question to them was, do I have
5 much in the way of cases that tell me what quantum of
6 evidence or maybe what types of evidence are typically found
7 to be sufficient in these crime fraud exception analyses at
8 the prima facie case stage and what aren't? Do I? And do
9 you have any view about whether there's more caselaw out
10 there on that subject?

11 MR. COHEN: Yes, Your Honor.

12 So the documents and the cases that I have seen,
13 the cases don't discuss it has to be a particular quantum of
14 evidence because, at the end of the day, it comes down to is
15 there -- sort of a two-part question. Number one, is there
16 anything other than allegations; right? If all you have is
17 somebody saying I think this happened, that's not evidence.
18 On the other hand, once you have documents, testimony from
19 somebody with personal knowledge, anything beyond that, now
20 you've got evidence and then the question becomes is that
21 evidence sufficient that if a trier of fact believed it, it
22 could establish the elements of crime fraud?

23 And so on the quantum of evidence, it could be
24 one document if that document is strong enough. It could be
25 five documents if those documents interlock in the right

1 way. So, you know, probably the most famous crime fraud
2 decision in recent memory is the one involving President
3 Trump and John Easterbrook, and there they were looking at
4 memos -- a memo, if I remember correctly, one memo that was
5 written and said that one memo was enough to say we've got a
6 problem. And they looked at e-mails and the Court looked at
7 the communications of the attorney to say this does fit
8 within the crime fraud.

9 But the cases don't discuss quantum of evidence
10 because it's almost an appellate "was there a sufficient
11 basis in the record for a jury to reach this finding"
12 discussion and that's any quantum of evidence is enough if
13 it shows the elements. And so --

14 THE COURT: Understood. And why don't I let you
15 make whatever points you want to make about the types of
16 evidence that you pointed to here. I do have another matter
17 after this one, so I want to try to resolve by the top of
18 the hour and give Mr. Meckley a chance to respond by way of
19 rebuttal.

20 Mr. Cohen, you were going to point me to what do
21 we have? What are the plaintiffs pointing to that is
22 "evidence" that a future fraud was intended?

23 MR. COHEN: Very quickly, Your Honor, we have
24 the acquisition FAQ. That is a document submitted by the
25 parties. It's in evidence. It is evidence.

1 Here's what it says, okay. It says, "The merger
2 agreement provides special protection for Tweep compensation
3 and benefits." That's the statement that Twitter made to
4 its employees. There is no question at all that Twitter is
5 now arguing that was not true. Everything single one of its
6 arguments, whether it's you're not third-party
7 beneficiaries; therefore, you can't enforce it. If it's not
8 an enforceable promise, it's not a special protection. The
9 statement now it was entirely discretionary before, it's
10 entirely discretionary now the, merger agreement didn't do
11 anything to your severance. Then it's not a special
12 protection. Every single one of those arguments is an
13 outright statement that the thing that they told the
14 employees was not true and was not intended to be true and
15 with that just two --

16 THE COURT: Mr. Cohen, is it the case that it's
17 really that special protection language that is the -- if
18 you were saying, look, the thing that they said that we
19 think is indicative and evidence of a fraud is they promised
20 that in the merger agreement there was special protection
21 for benefits, including severance benefits, and that was
22 false --

23 MR. COHEN: Your Honor, I'm not going to say
24 that's the only thing in here that's problematic, but it is
25 the most glaring and, frankly, irrefutable thing. Because

1 special protections -- if it means anything at all, special
2 protections means this is not just going to be left up to
3 Elon's discretion after he comes in. Otherwise, that phrase
4 is meaningless.

5 And the entire argument from Twitter and
6 Mr. Musk and from X Holdings, the parent company here, has
7 been no, there were no special protections. Severance was
8 discretionary before; it's discretionary now. Anything that
9 was in the merger agreement was entirely unenforceable and
10 did nothing at all to protect the severance. Those two
11 statements cannot be squared. They cannot be both true.

12 Separately, Your Honor, with respect to just two
13 of the arguments they've made on that, number one, there's
14 been an argument that the merger agreement allowed Twitter
15 to change the severance anyway. Number one, that's
16 something that's going to be addressed in the motion to
17 dismiss. We've made our arguments for why that's wrong.
18 But it's also irrelevant here because what the merger
19 agreement required was not that Twitter would pay severance
20 of a particular type but that the parent company would pay
21 severance of a particular type.

22 And what they told the employees here was that
23 the purchasing entity, which was the parent X Holdings,
24 Corp., would provide the severance. So even if the merger
25 agreement let Twitter change its severance policy -- and

1 again, you'll see in the motion to dismiss as you do the
2 analysis they didn't -- Twitter told the employees the
3 parent company would have the obligation to pay them the old
4 severance. Discretionary.

5 If you see the language that's highlighted in a
6 different color, Your Honor, the language wasn't that the
7 severance program will remain the same. The language is
8 that the severance benefits will be no less favorable than
9 those applicable to an applicable employee, those that were
10 categorically available to the employee. And Twitter's
11 prior severance policy had different categories for
12 different employees. They had employees who were level
13 seven and below got three-month severance packages and
14 employees that were level eight and up got six-month
15 severance packages. That's the package that was applicable.

16 It may well be that in the before times, Twitter
17 could exercise discretion about whether or not it gave any
18 particular employee an applicable -- a package that was
19 applicable to it, but what they told these employees was
20 that after the merger, for a year after the merger, the
21 parent company will provide you the package that was
22 applicable. So and --

23 Just quickly, this is the various areas of the
24 FAQ where it mentioned that. This is here primarily
25 because, Your Honor, this was not a one-off promise. They

1 updated that FAQ 12 times, 13 times in total. Twitter said,
2 hey, employees, here is the information you need to know.
3 And every single time they included that language, this
4 merger agreement provides special protections. The
5 acquiring company is going to provide you the severance
6 payment that was applicable to you before, not the one you
7 would have gotten if we were exercising discretion, but the
8 one that was applicable to you.

9 Again, if this is purely discretionary, it was
10 discretionary before, it's discretionary now, then there is
11 no special protection, and that representation to the
12 employees is false, and that language is in the merger
13 agreement itself.

14 THE COURT: Mr. Cohen, last question I have. I
15 wanted to let Mr. Meckley have a few brief comments before
16 the top of the hour. My last question I have is I
17 understand your assertion about the special protection
18 wording and why you think that was false or misleading. But
19 to the extent that wording is informed by what is then said
20 below -- what do we mean by special protection? Look below
21 and we tell you -- and when it came to telling about the
22 severance benefits, what was said is that they're no less
23 favorable than those you had before. And I think the
24 argument is from the other side that's what we meant by
25 special protections. That's what we said we meant, and less

1 favorable means the same, and before we could have done what
2 we did, and now we did what we did. How do you respond to
3 that kind of argument about how -- why "special protection"
4 doesn't have the meaning you think it does.

5 MR. COHEN: Two things, Your Honor.

6 Number one, if it was discretionary before, it's
7 discretionary now. That's not a protection because
8 "discretionary" means we can zero it out, we can go to 100,
9 we can do whatever we want. To say, look, I'm specially
10 protecting, Your Honor, your car, what I mean by that is
11 somebody could steal it before, somebody could steal it
12 after, I'm not going to do anything different, I think
13 everybody would recognize semantically that's not what
14 "special protection" means. You can't turn around and say
15 our special protection is discretionary. If they wanted to,
16 there was certainly a way they could have done that, which
17 was to say that it's discretionary.

18 But the second point is this word that I circled
19 here, "applicable to." It does not say that continuing
20 tweeps whose employment is terminated will get whatever
21 severance they would have gotten under the prior policy. It
22 says they're going to get the severance that was applicable
23 to those employees and that is, again, the same language
24 from the merger agreement. They're going to get what was
25 applicable to those continuing employees.

1 And what was applicable to those continuing
2 employees is the category that says if you're an employee
3 here, then you are allowed to get this package in general.
4 If you're employee here, if you've got a higher level job,
5 then this package is applicable to you and we'll vary from
6 it on our discretion, but that's what was applicable.

7 When you tell the employees that for a year
8 they're going to get whatever package was applicable to
9 them, that doesn't mean when you tell me that you're telling
10 the employees you'll get whatever we want to give you. It's
11 this is the package that you're going to get. That does not
12 retain discretion. That actually tosses discretion out the
13 window. The parent must provide whatever was applicable to
14 them.

15 THE COURT: Okay. All right. We'll have to
16 leave it there, Mr. Cohen. Let me turn back and give
17 Mr. Meckley a few moments --

18 MR. COHEN: Let me see if I can figure out how
19 to stop sharing. There we go.

20 THE COURT: You're a better person than I in
21 that regard. Thank you.

22 Mr. Meckley, I think, Mr. Meckley, hearing all
23 this I think what you're kind of saying is you view the
24 dispute here, which the plaintiff has framed in terms of
25 fraud, as kind of like a difference of opinion about a word

1 and what a word in a contract means. And I think you're
2 kind of suggesting to me, Judge, that's not what we
3 typically think of, like, evidence of fraud. That's a
4 dispute amongst lawyers about what a word might mean, and
5 there needs to be more than that.

6 Is that kind of what's going on here in your
7 mind? Or am I misreading what your argument is? I'm not
8 saying it's correct. I'm saying what the gist of your
9 argument is.

10 MR. MECKLEY: Three points in response, Your
11 Honor. The first point is exactly what you noted.

12 Mr. Cohen is arguing his interpretation of what
13 words mean, how they relate to one another, how do the FAQs
14 relate to the merger agreement, et cetera. And his
15 arguments are just that. They're arguments. They're not
16 evidence. Evidence is witness testimony under penalty of
17 perjury, interrogatories, responses to requests for
18 production. That's evidence, not argument.

19 THE COURT: Mr. Meckley, do you know, are there
20 any cases about whether contractual language and its
21 meaning -- I say contractual language here. The FAQs
22 really are what's pointed to. That's not a contract. It's
23 a statement. I guess, are you aware of cases that -- if
24 you're making the suggestion that this is a dispute about
25 the meaning of a word and that's not typically what we think

1 of as the kind of evidence that implicates the crime fraud
2 exception, are there cases that get to that question that
3 you're aware of?

4 MR. MECKLEY: It's an excellent point, and I
5 think -- I can't cite them to you right now, Your Honor, but
6 if we go through the sequencing process that I propose that
7 the Court follow, which is decide the motion to dismiss then
8 we can do the briefing -- we can do that briefing at any
9 point the Court wants it to drill down on some of the
10 specific issues that the Court has highlighted today, that's
11 what I would suggest doing. But I agree with you. You
12 characterized my first point correctly, which is this is
13 argument. This isn't evidence, and it's very much one
14 attorney's interpretation of what the language means.

15 THE COURT: Let me let you continue.

16 MR. MECKLEY: The second point I wanted to make
17 is Mr. Cohen made the suggestion that not all of these
18 documents would be privileged, that there would be some
19 documents that would not be privileged and those should be
20 produced. And he made an example of communications, e-mails
21 between the firms on the other side of the transaction.

22 And that is not true. All documents will be
23 privileged. The privilege covers all pre-merger
24 negotiations, and specifically this is -- I would refer the
25 Court to the *Great Hill Equity Partners* case it's 80 A 3d

1 155 Delaware 2013. Absent an express carveout in the
2 relevant merger agreement, this agreement provides that
3 privileges over all merger communications, including those
4 relating to the negotiation of the merger itself, passed to
5 the surviving corporation in the merger. His exact example,
6 those documents would be privileged based upon this. I want
7 to clarify that.

8 Third and final point. I think Mr. Cohen
9 suggested that we should have the law firms do all this
10 extremely expensive, time-consuming, burdensome work to sort
11 of go through and prep privilege logs in the hope that at
12 some point down the line the motion to dismiss is overruled
13 and, therefore, now, immediately, we can proceed to that.
14 And I would just suggest that's exact reverse of what we
15 should be doing in terms of efficiency, and these firms
16 should not have do all that work if the motion to dismiss is
17 going to be or would be granted, in which case I believe
18 that if the motion to dismiss is granted, all of this goes
19 away. There is no fraud claim in the case.

20 That's my last point.

21 THE COURT: Okay. I thank counsel for their
22 arguments.

23 What I'm going do is get back to you with some
24 answer on what we're doing with regard to this issue this
25 week in short order, and one way or the other, that may also

1 include an ask for the parties to submit maybe just an
2 additional letter brief, cabined to just a couple of pages,
3 that may supplement the record in terms of relevant caselaw
4 since we talked about that today and I think at some point
5 both sides have suggested there might well be additional
6 relevant caselaw that could help the Court. At a minimum,
7 I'll do that and let you know how I'm going to proceed with
8 regard to the remaining issue as regards the motion to
9 quash.

10 Before we end, Mr. Cohen, I saw you raise your
11 hand. Is there anything you want to say procedurally before
12 we end?

13 MR. COHEN: One thing in terms of the question
14 on caselaw, I would point the Court to the *Montada* case
15 where it analyzed a representation to employees and which
16 words were fraudulent within those representations.

17 Procedurally, Your Honor, we have set a deadline
18 for the responses to the subpoena of tomorrow for written
19 responses and objections. I just wanted to make sure the
20 Court was aware of that. If you want that to be stayed
21 pending something further, you should let us know. I think,
22 certainly, written responses and objections are not
23 particularly burdensome, and so depending on what the
24 Court's sense of timing is, you should let us know how you
25 want to handle that, whether it's written responses,

1 objections, or further productions.

2 THE COURT: Mr. Meckley, is there anything you
3 want to say about whether -- Mr. Cohen is talking about
4 written responses to regarding objections could be provided
5 even if the process of searching for and assessing
6 responsive documents in light of them would not be.

7 MR. MECKLEY: My belief, based upon the FRCP and
8 just sort of common practical sense, would be the motion to
9 quash should stay any response unless and until the motion
10 to quash is resolved. So there should be no response while
11 that is pending.

12 THE COURT: Okay. That may be something I'll
13 ask the parties to at least -- to meet-and-confer about
14 briefly hereafter, but let me -- as I said, I'll get you a
15 short order that would tell you procedurally how I'm going
16 to try to handle this issue and look for some additional
17 language from the Court about what I might be asking the
18 parties to do. Okay.

19 But thank you, counsel, for your time. I
20 appreciate it, and I'll look forward to being in touch with
21 you in the future. Take care. We'll go off the record.
22 Thank you.

23

24

25

C E R T I F I C A T E

I, Deanna L. Warner, a Registered Professional Reporter, do hereby certify that as such Registered Professional Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings.



Deanna L. Warner, RPR, CSR
Official Court Reporter
U.S. District Court

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